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SERVICE DATE - LATE RELEASE OCTOBER 15, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-873X

NEW YORK AND EASTERN RAILWAY, LLC—DISCONTINUANCE EXEMPTION—IN
DUTCHESS COUNTY, NY

STB Docket No. AB-55 (Sub-No. 652X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE EXEMPTION—IN DUTCHESS
COUNTY, NY

STB Docket No. AB-565 (Sub-No. 17X)

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—IN DUTCHESS
COUNTY, NY

Decided: October 15, 2004

By petition filed on June 29, 2004, New York and Eastern Railway, LLC (NY&E), CSX Transportation, Inc. (CSXT), and New York Central Lines, LLC (NYC) (collectively, petitioners) jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for NY&E and CSXT to discontinue service over, and for NYC to abandon, an approximately 4.7-mile line of railroad between milepost QCO 0.0 and milepost QCO 3.2 and between milepost QCK 29.5 and milepost QCK 31.0, in the City and Town of Poughkeepsie, Dutchess County, NY. Notice of the filing was served and published in the Federal Register on July 19, 2004 (69 FR 43054), instituting an exemption proceeding. On August 2, 2004, the Great Eastern Color Lithographic Corporation (Great Eastern) timely filed a protest in opposition to the petition. By decision served on August 27, 2004, the petitioners' request for an extension of time to respond to the protest was granted. On September 2, 2004, CSXT and NYC filed a joint reply, and NY&E filed a separate reply. On July 22, 2004, the County of Dutchess (Dutchess County) filed a request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition. The exemption will be granted, subject to trail use, public use, environmental, and standard employee protective conditions as appropriate.

BACKGROUND

The line was originally owned and operated by Consolidated Rail Corporation (Conrail) and its corporate predecessors. Subsequently, it was acquired by NYC for operation by CSXT as

part of the joint acquisition and partition of Conrail by CSXT and Norfolk Southern Corporation. See CSX Corp. et al.–Control–Conrail Inc. et al., 3 S.T.B. 196 (1998).

NY&E took possession of the line on September 10, 2003, pursuant to a 10-year lease with NYC. NY&E is a Class III short line railroad established in 2003 to lease and operate the line. See New York and Eastern Railway LLC–Lease, Operation, and Future Purchase Exemption–New York Central Lines, LLC and CSX Transportation, Inc., STB Finance Docket No. 34358 (STB served June 27, 2003). NY&E replaced CSXT as the operator of the line although CSXT retained a residual common carrier obligation to serve the line. At the time NY&E assumed the common carrier obligation, there had been no traffic on the line since November 2000. According to petitioners, a joint marketing program by NY&E and CSXT to promote traffic on the line was ultimately unsuccessful. As a result, petitioners mutually decided to terminate the lease and to seek abandonment and discontinuance authority from the Board.

Petitioners assert that, should area shippers need rail service, CSXT provides rail service over its contiguous New York-Albany main line through Poughkeepsie. In addition, they state that there are substantial transportation alternatives available over U.S. Highways 9, 9W, and 43 in the Poughkeepsie area, along with a water route through the Hudson River.

POSITION OF THE PARTIES

Great Eastern is a lithographic printer located in Poughkeepsie, NY, that employs 76 people. It receives approximately 1.4 million pounds of publication-grade paper each month. Historically, Great Eastern has chosen to receive its shipments by rail and has spent a substantial amount of money to install and maintain its rail siding and switch. Great Eastern asserts that, “because of the de facto abandonment,” it must truck the paper from paper mills located throughout the United States and Canada at an increased expense. It also notes that, because some mills are unwilling to ship by truck, it has fewer options with respect to paper suppliers, and thus, less opportunity to shop for the lowest price. Great Eastern asserts that, even if the paper mill is willing to ship to its location, the process involves additional handling that creates increased costs, time delays, and damage to the paper.

Great Eastern alleges that the petition for exemption contains false and misleading statements. It argues that petitioners’ statement that the line has not handled a single carload is disingenuous. Great Eastern claims that poor track condition and not lack of demand is the reason for nonuse of the line. It asserts that it was informed by Kenneth E. England, Jr., track specialist with the U.S. Department of Transportation, Federal Railroad Administration, Office of Safety, that the line was found to be non-compliant with Federal track safety standards, and that, facing fines, CSXT voluntarily elected to take the line out of service. Great Eastern also questions the extent of a joint marketing program by NY&E and CSXT, stating that it was not contacted by either party in regard to reestablishing service.

In reply, CSXT states that, at the time it acquired the line, the line was in poor physical condition and there was little traffic. Although it continued to operate the line, CSXT alleges that there was not sufficient traffic to warrant the expenditure to rehabilitate the line. The last traffic to move on the line was in November 2000. Instead of seeking to abandon the line, CSXT leased the line to NY&E. In its reply, NY&E states that it contacted Great Eastern, EpcO Products, Effron & Son, Propane Company of Fulton Street, and Fairview Business Park in an effort to locate and generate business. Of these, Great Eastern advised NY&E that it currently trucked about 100-125 carloads of inbound paper annually from a rail siding to its Poughkeepsie printing plant and indicated a desire to resume moving this product exclusively by rail but, according to NY&E, Great Eastern was unwilling to make commitments sufficient for CSXT to continue operating the line. EpcO, Effron, and Propane Company indicated that they had no interest in using rail service. Fairview Business indicated that it saw no rail potential for its current tenants. NY&E also contacted Ed Murphy, Development Director for the City of Poughkeepsie (the City) and met with the Dutchess County Development Corporation, but found no interest in developing rail business in the City. In addition, NY&E states that the City opposed its use of the Smith Street Yard as a transload operation. NY&E estimates that it would cost \$2,000,000 to rehabilitate the line. These repairs would consist of: brush cutting, tree removal, bridge repairs, and replacement of most of the ties and rail.

CSXT submits that Great Eastern has used alternative transportation since November 2000, either receiving shipments by truck or through rail transload operations. Given the lack of traffic at present and projected in the future, CSXT determined that rehabilitation and operation expenses would be a poor investment. NY&E, a short line operator with lower costs than CSXT, has concurred.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioners from the expense of owning and maintaining a line that generates no traffic, and by allowing NYC to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no active shippers on the line. Nevertheless, to ensure that all shippers located on the line are informed of our action, petitioners will be required to serve a copy of this decision and notice on them within 5 days from the service date and certify to the Board that they have done so. Given the market power finding, it is not necessary to determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. However, we do not normally impose employee protective conditions when a carrier abandons its entire operations unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galetton R. Corp.—Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.—Abandonment, 354 I.C.C. 784 (1978) (Northampton). In STB Docket No. AB-873X, NY&E proposes to abandon its entire operation over the entire line. NY&E states that no corporate affiliate of NY&E will continue substantially similar rail operations and there is no corporate parent that would benefit from the proposed discontinuance. Further, no one has attempted to show that the situation under Northampton for imposing employee protection exists in this case. Under the circumstances, we will not impose labor protective conditions on NY&E's discontinuance of service. However, with respect to CSXT's discontinuance of service in STB Docket No. AB-55 (Sub-No. 652X) and NYC's abandonment in STB Docket No. AB-565 (Sub-No. 17X), the interests of their employees will be protected by the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Petitioners have submitted environmental and historic reports with their petition and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on August 27, 2004, and requested comments by September 24, 2004.

In the EA, SEA recommended that conditions be imposed on any decision granting abandonment authority with regard to the following entities: (1) the U.S. Department of Commerce, National Geodetic Survey (NGS); (2) the U.S. Department of Interior, Fish and Wildlife Division, Region 5, New York Field Office (FWS); (3) the U.S. Army Corps of Engineers, New York District (Corps); (4) the New York State Department of Environmental Conservation, Endangered Species Program (NY-ESP); (5) the New York State Department of Environmental Conservation, Division of Water (NY-DW); (6) the New York Department of State, Coastal Management Program (NY-CMP); and (7) the Town of Poughkeepsie (the Town). The first condition recommended by SEA would require NYC to provide NGS with at least

90 days' notice prior to initiation of any salvage operations that may disturb or destroy the seven geodetic station markers identified on the right-of-way so that plans can be made for their relocation. SEA recommended six additional conditions which would prohibit NYC from salvaging or disposing of the entire right-of-way until consultations with the other entities listed above have occurred.

SEA indicates that, based on a telephone conversation with Mr. Peter Nye, Unit Leader, NY-ESP, on October 1, 2004, it has been determined that, due to the location of the proposed abandonment and the nature of the salvage operations, NY-ESP has no concerns regarding potential adverse impacts to endangered species. SEA therefore recommends that the previously recommended condition (No. 4) in the EA, prohibiting NYC from salvaging or disposing of the entire right-of-way until consultation with NY-ESP has been completed not be imposed. No other comments were received. Accordingly, with the exception of condition 4, we will impose the conditions recommended by SEA in the EA. Based on SEA's recommendation, we conclude that the proposed discontinuance and abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, Dutchess County filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and for imposition of a public use condition under 49 U.S.C. 10905. Dutchess County has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. In a letter filed on July 23, 2004, CSXT stated that, on behalf of NYC, it is willing to negotiate with Dutchess County for interim trail use. Because Dutchess County's request complies with the requirements of 49 CFR 1152.29, and CSXT, on behalf of NYC, is willing to enter into negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, NYC may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in the EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. Dutchess County requests imposition of a 180-day public use condition prohibiting NYC from: (1) disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. Dutchess County states that the 180-day period is needed to assemble and review title information and to begin negotiations with the carrier.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Dutchess County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, NYC must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NYC is not required to deal exclusively with Dutchess County, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuance of service by NY&E and CSXT over, and the abandonment by NYC of, the above-described line, subject to employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979) with respect to CSXT's discontinuance of service in STB Docket No. AB-55 (Sub-No. 652X) and NYC's abandonment in STB Docket No. AB-565 (Sub-No. 17X), and the conditions that NYC shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) provide NGS with at least 90 days' notice prior to

initiation of any salvage activities that may disturb or destroy any of the seven geodetic station markers on the right-of-way so that plans can be made for their relocation; (3) consult with FWS, Corps, NY-DW, NY-CMP, and the Town prior to initiation of salvaging or disposing of the entire right-of-way; and (4) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below.

2. Petitioners are directed to serve a copy of this decision and notice on all shippers on the line within 5 days after the service date of this decision and notice and to certify to the Board that they have done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, NYC may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 25, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100.¹ See 49 CFR 1002.2(f)(25).

¹ This fee is scheduled to increase to \$1,200, effective October 31, 2004. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective November 14, 2004. Petitions to stay must be filed by November 1, 2004, and petitions to reopen must be filed by November 9, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NYC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NYC’s filing of a notice of consummation by October 15, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary